

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

)	
Petition for Zoning Exemption Pursuant to)	
G.L. c. 40A, § 3 for Salem Harbor Station's)	
310 CMR 7.29 Emissions Control)	D.T.E. 03-____
Project)	
)	

**PETITION FOR ZONING EXEMPTION PURSUANT TO G.L. c. 40A, § 3
AND MOTION TO DEFER CONSIDERATION OF REQUEST
FOR EXEMPTION FROM SITE PLAN REVIEW**

I. SCOPE OF PETITION

Pursuant to G.L. c. 40A, § 3, USGen New England, Inc. ("USGenNE" or the "Company") hereby petitions the Department of Telecommunications and Energy ("DTE" or the "Department") for a comprehensive exemption from the operation of the Zoning Ordinance of the City of Salem with respect to the potential construction and use of an Emission Control Plan ("ECP") project (the "Project") proposed for Salem Harbor Station ("Salem Harbor" or the "Facility"). As will be discussed in detail below, the Company requests a comprehensive exemption due to the numerous individual exemptions required from the Zoning Ordinance, and due to the terms of an Administrative Consent Order ("ACO") (included as Appendix 1) under which the Company has agreed to endeavor to obtain all necessary permits and regulatory approvals for the Project as expeditiously as possible.¹

The Company, however, also hereby moves that the Department defer consideration of one aspect of the Company's request for a comprehensive exemption. Specifically, the Company requests that the Department defer consideration of its request for an exemption from

¹ The exact timing of construction is subject to receipt of all required governmental authorizations, the arrangement of financing for such construction and, potentially, the approval of the U.S. Bankruptcy Court for the District of Maryland (Greenbelt Division), in which the bankruptcy proceeding of USGenNE is now pending.

the Site Plan Review requirements of Section 7-18 of the City of Salem's Zoning Ordinance. It is the preference of the Company to work closely with the City of Salem, satisfy the requirements of the City's Site Plan Review process, and obtain the approval of the Planning Board in a timeframe and under terms that would allow the Company to meet its obligations under the ACO. Toward that end, the Company has today filed with the Planning Board of the City of Salem an application for Site Plan Review. The Company, therefore, requests that the Department defer consideration of its request for an exemption for the Project from the City's Site Plan Review requirements.

II. DESCRIPTION OF THE PROJECT

Salem Harbor consists of three primarily coal-fired boilers (Units 1, 2 and 3) and one oil-fired boiler (Unit 4), with a total nominal generating capacity of approximately 755 MW.

Pursuant to the regulations of the Department of Environmental Protection ("DEP") at 310 CMR § 7.29 (the "7.29 Regulations"), Salem Harbor must reduce its facility-wide annual emissions of nitrogen oxides ("NO_x"), sulfur dioxide ("SO₂"), mercury ("Hg") and carbon dioxide ("CO₂").

Presently, Units 1, 2, and 3 are equipped with Low-NO_x Burners ("LNB") and Selective Non-Catalytic Reduction ("SNCR") systems for control of NO_x emissions, and Electrostatic Precipitators ("ESPs") for control of particulate matter ("PM") emissions. Unit 4 is presently equipped with LNB and an ESP to control emissions of NO_x and PM, respectively. As a means of complying with the emission limitations in the 7.29 Regulations, the Facility is expecting to install the following emission control equipment:

~~One~~ **One Selective Catalytic Reduction ("SCR") unit for the control of NO_x from Units 1, 2 and 3.** The SCR will be located downstream of the existing electrostatic precipitators ("ESPs"), which will remain in place and continue to reduce particulate matter emissions from the flue gas. Use of this SCR will require installation of a gas-fired reheater to bring the flue gas to the required operating temperature for the SCR. The SCR will be

sized to treat the combined flue gas stream of Units 1, 2 and 3. The current SNCR system for Units 1, 2 and 3 will be removed.

~~2.0~~ **One dry Flue Gas Desulfurization (“FGD”) and Fabric Filter (“FF”) system for the control of SO₂ emissions from Units 1, 2 and 3.** It will also assist in the control of sulfuric acid, particulate matter and mercury emissions. The FGD/FF will be sized to treat the combined flue gas stream of Units 1, 2, and 3.

~~2.0~~ **One Selective Non-Catalytic Reduction (“SNCR”) system for the control of NO_x emissions from Unit 4 and the use of lower sulfur oil for SO₂ emission reductions.**

The Project will also include the following ancillary equipment and structures:

? **Multiple hearth furnace for ash reduction process (ARP).** The ARP will process fly ash in order to reduce the unburned carbon in the ash, and permit the ash to be recycled as a substitute for cement in the concrete manufacturing process.

? **Natural gas interconnection to local distribution company’s gas line and gas metering equipment.** Natural gas will be used for reheating flue gas for proper operation of the SCR. The Project will require 150 MMBtu/hr of gas for startups and 105 MMBtu/hr of gas for steady operations.

? **Interconnection to South Essex Sewerage District Wastewater Treatment Facility, including a water treatment equipment building and water storage tanks.** To support the emission reduction equipment, additional process makeup requirements at the site are expected to approach 600,000 gallons per day, the bulk of which is proposed to be satisfied through reuse of treated effluent from South Essex Sewerage District.

? **Electrical equipment building.** The building will be used to house the control rooms, electrical equipment and wash room facilities.

? **Transformers and Expansion of Switchyard.** The electrical switchyard located to the west of the power house will be expanded to include a new 115 kv switch bay. New 115 kv cable will be installed below grade from the new switch bay to the two new 115 kv/4160 v power transformers that will serve the ECP and will be located within that area.

? **Other equipment and structures:** boosters fans and enclosure; ductwork to combine flue gas streams; a gas-to-gas heat

exchanger to heat flue gas upstream of the duct burner; lime reagent receiving, storage and preparation equipment; urea receiving and storage equipment; urea to ammonia conversion equipment and silo; ARP auxiliary equipment including fabric filter, ARP ash blowers and electrical equipment enclosure, ARP waste ash silo, ARP ash storage silos, and pozzolan storage silo and load out area; spent FGD reagent blowers and electrical equipment; and other miscellaneous equipment.

A more detailed description of the Project can be found in Section 1.0 of the *310 CMR*

7.29 Emissions Control Project Environmental Impact Statement prepared by TRC

Environmental Corporation included here as Appendix 2.

III. DESCRIPTION OF THE PETITIONER

USGenNE is a Delaware corporation, qualified to do business in Massachusetts, with its principal place of business at 7600 Wisconsin Avenue, Bethesda, Maryland, and its

Massachusetts office at 50 Congress Street, Boston. USGenNE owns Salem Harbor.²

USGenNE is a wholesale generation company as defined in G.L. c. 164, § 1. *D.P.U. 98-20*

Petition of USGen New England, Inc. Requesting an Advisory Ruling by the Department of Telecommunications and Energy, Pursuant to 220 C.M.R. § 2.08(1), April 8, 1998.

IV. STANDARD OF REVIEW

Pursuant to G.L. c. 40A, § 3, the Department is authorized to grant exemptions from the operation of a municipality's zoning ordinance or by-laws as follows:

Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and energy shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public . . .

² Salem Harbor is owned by USGenNE, and is managed and operated by subsidiaries of PG&E National Energy Group, Inc. ("PG&E NEG"). Where this Petition refers to USGenNE "managing and operating Salem Harbor," or words similar thereto, it is understood that such functions are performed by these subsidiaries. USGenNE filed a voluntary petition for bankruptcy last July and is operating Salem Harbor as a debtor in possession.

In administering G.L. c. 40A, § 3, DTE applies a three-pronged test to determine whether an entity should be exempted from a local zoning ordinance or by-law. The petitioner must (i) establish that it is a public service corporation (“PSC”), *see Save the Bay, Inc. v. Department of Public Utilities*, 322 N.E.2d 742 (1975); (ii) establish that an exemption from the municipality’s zoning ordinance or by-laws is required, *see Boston Gas Company*, D.T.E. 00-24, at 3 (2001); and (iii) demonstrate that the project is reasonably necessary for the public convenience or welfare. *See Massachusetts Electric Company*, D.T.E. 01-77, at 5 (2002); *Tennessee Gas Pipeline Company*, D.T.E. 01-57, at 3-4 (2002).

V. PUBLIC SERVICE DEMONSTRATION

For the reasons set forth in the accompanying Memorandum of Law in Support of USGen New England, Inc.’s Petition for Zoning Exemption Pursuant to G.L. c. 40A, § 3, the Company submits that it is a public service corporation with respect to its ownership and operation of Salem Harbor.

VI. COMPREHENSIVE ZONING EXEMPTION REQUESTED

USGenNE requests a comprehensive exemption from the provisions of the City of Salem’s Zoning Ordinance (“Zoning Ordinance”) (included as Appendix 3). As the Department recently explained, petitions for comprehensive zoning relief are appropriately granted in circumstances “where numerous individual exemptions are required or where the issuance of a comprehensive exemption could avoid substantial public harm by serving to prevent delay in the construction and operation of the proposed use.” *NSTAR Electric & Gas Corporation*, D.T.E. 03-7, at 33, (2003); *see also Tennessee Gas Pipeline Company*, D.T.E. 01-57, at 11 (2002); *Massachusetts Electric Company*, D.T.E. 01-77, at 30-31 (2002). In the instant case, a comprehensive zoning exemption is appropriate because USGenNE requires numerous individual exemptions under the Salem Zoning Ordinance. *See* Section VI.A, *infra*. In addition,

the parties to the ACO deemed it to be in the public interest to proceed with the installation of the Project as soon as possible. Appendix 1, Sections II. Q and R.

A. NUMEROUS EXEMPTIONS REQUIRED

In order to build the Project, USGenNE will, at a minimum, need exemptions from all of the following provisions of Salem's Zoning Ordinance:

- ?? Section 5-3(j) relating to nonconforming lots, structures, land and uses;
- ?? Article VIII relating to nonconforming lots, structures, land and uses;
- ?? Section 9-4 relating to special permits;
- ?? Sections 4-1(2)(a) and (d) relating to the height and dimensional requirement of the Zoning Ordinance;
- ?? the requirements of Table II of Article VI;
- ?? Section 9-5 relating to variances;
- ?? Section 7-4 relating to off-street loading; and
- ?? Section 7-18 relating to Site Plan Review.

Based on its current understanding of the planned equipment layout, construction plan and operating characteristics of the Project, the Company knows of no other exemptions which will be needed. However, it is possible that some feature of this approximately \$150 million Project could evolve during the permitting process or the construction process in such a manner as to fall within another zoning provision from which an exemption would be needed. To address that possibility, the Company proposes to notify the DTE of such change but would proceed with the Project, assuming a comprehensive exemption had been granted.

B. EXEMPTIONS ARE NEEDED TO ADHERE TO ACO SCHEDULE

1. Special Permit for Activities Performed on or with Respect to Nonconforming Structures and Uses (Section 5-3(j), Article VIII and Section 9-4 of the Zoning Ordinance).

a. Salem Harbor's Legally Nonconforming Status.

Under the Zoning Ordinance, the structures at Salem Harbor are nonconforming with respect to certain dimensions, and the use of Salem Harbor, the generation of electric power, is a nonconforming use. However, the nonconformity of both the structures at and the use of Salem Harbor is permitted under the Zoning Ordinance and state law. Both Article VIII of the Zoning Ordinance and G.L. c. 40A, § 6 provide that the Zoning Ordinance does not apply to structures or uses lawfully in existence when the Zoning Ordinance was adopted. Because the structures at and use of Salem Harbor were lawful when commenced, Salem Harbor, as it exists today, is entitled to protection from both the dimensional and use regulations of the Zoning Ordinance.

b. Special Permit Requirement for the Alteration, Reconstruction, Change, Enlargement, Extension or Expansion of Nonconforming Structures and Uses.

Although Salem Harbor is legally nonconforming with respect to dimensions and use, zoning relief is required if USGenNE performs certain activities at Salem Harbor. Section 5-3(j), Article VIII and Section 9-4 of the Zoning Ordinance provide that nonconforming structures and nonconforming uses of land and structures may not be altered, reconstructed, changed, enlarged, extended or expanded unless a special permit is granted by the City of Salem Zoning Board of Appeals (the "Board of Appeals"). The Project will arguably result in the alteration, reconstruction, change, enlargement, extension and/or expansion of both the nonconforming structures and the nonconforming use of the structures and land at Salem Harbor. Therefore, absent an exemption, USGenNE would have to apply for and obtain a special permit to construct the Project.

c. Special Permit Procedure.

Although USGenNE believes the Project meets the criteria to receive a special permit, requiring USGenNE to go through the procedure of obtaining such a special permit is a substantial impediment to installing the Project in accordance with the ACO schedule which provides only five months to complete the zoning process. *See* Appendix 1, Exhibit B (the “ACO Schedule”). The special permit procedure is lengthy and fraught with potential delay and uncertainty. The process for obtaining a special permit from the Board of Appeals can take up to 169 days after the submittal of the special permit application. *See* Appendix 4 for the required contents of the application for a special permit and Appendix 5 for the procedure for obtaining and appealing a special permit. Moreover, a special permit granted by the Board of Appeals may be appealed within twenty days after its grant for substantive objections, and within ninety days after its grant for procedural defects. In other words, it could take almost six months for USGenNE to obtain a special permit, and it could take almost nine months before USGenNE could rely on such permit with the certainty that it could no longer be challenged. If an appeal were to occur within the requisite timeframe, the matter would go to the Land Court, Superior Court, Housing Court or District Court. In that case, USGenNE’s ability to commence the Project would be subject to the uncertainty and delays of the court system. An appeal would virtually assure that the Project would not be completed pursuant to the ACO Schedule. Therefore, USGenNE requests an exemption from the special permit requirement in Section 5-3(j), Article VIII and Section 9-4 of the Zoning Ordinance.

2. *Variance from Zoning Ordinance Height and Dimensional Requirement (Sections 4-1(2)(a) and (d), Table II of Article VI, Section 7-4 and Section 9-5 of the Zoning Ordinance).*

a. Height and Dimensional Requirements. The Project will include the construction of emission control equipment that exceeds the maximum height limitation of 45 feet in the

industrial zoning district in which Salem Harbor is located, which limitation is set forth in Table II of Article VI of the Zoning Ordinance. In addition, the Project will require that new structures be built and that internal roadways be constructed at the Facility. These elements of the Project will require relief from the dimensional requirements of Article VI of the Zoning Ordinance and the off-street loading requirements of Section 7-4 of the Zoning Ordinance.

b. Variance Requirement. According to Section 4-1(2)(a) of the Zoning Ordinance, no building or other structure may be erected or altered to exceed the height specified for the district in which it is located, or to have narrower or smaller front yards, side yards, rear yards or other open spaces specified for the district in which it is located. According to Section 7-4 of the Zoning Ordinance, each non-residential structure must meet certain off-street loading requirements. However, the Board of Appeals may grant a variance from that district's height, dimensional and off-street loading requirements provided certain criteria are met. *See* Section 9-3(d)(3) of the Zoning Ordinance.

c. Variance Procedure. Even if the Board of Appeals were to grant USGenNE a variance for the height of the Project equipment, the procedure could reasonably be expected to delay construction beyond the timeframe set forth in the ACO Schedule. The process for obtaining a variance from the Board of Appeals can take up to 114 days from the submittal of the petition for a variance. *See* Appendix 6 for the required contents of the application for a variance. *See* Appendix 7 for the procedure for obtaining and appealing a variance. Moreover, a variance granted by the Board of Appeals may be appealed within twenty days after its grant for substantive objections, and within ninety days after its grant for procedural defects. It could, therefore, take almost four months for USGenNE to obtain a variance, and it could take almost seven months before USGenNE could rely on such variance with the certainty that it could no

longer be challenged. If an appeal were to occur within the requisite timeframe, the matter would go to the Land Court, Superior Court, Housing Court or District Court, and USGenNE's ability to commence the Project would be subject to the uncertainty and delays of the court system. An appeal would virtually assure that the Project would not be completed pursuant to the ACO Schedule.

For the above-stated reasons, to ensure that the Project is not precluded from commencement and completion in accordance with the ACO Schedule, USGen NE will need an exemption from the height and variance requirements of the Zoning Ordinance as dictated in Section 4-1(2)(a), Table II of Article VI and Section 9-5 of the Zoning Ordinance.

3. Site Plan Review (Section 7-18 of the Zoning Ordinance).

a. Applicability. Section 7-18 of the Zoning Ordinance dictates that no structure exceeding 10,000 square feet in non-residential gross building area may be "...constructed, reconstructed, enlarged, altered or used except in accordance with a site plan submitted and approved by the [Planning Board]." See Appendix 8 for the contents required for applications for Site Plan Review approval. In deciding whether to grant Site Plan Review approval, the Planning Board considers numerous criteria as set forth in Section 7-18 of the Zoning Ordinance. See Appendix 9 for a detailed listing of the criteria applied by the Planning Board in its review of Site Plan Review approval applications.

Salem Harbor consists of a number of interdependent structures, either directly connected to one another or attached by pipes, wires or conveyor belts, which, in the aggregate, exceed 10,000 square feet of non-residential gross building area. USGenNE expects that the Planning Board will (i) treat Salem Harbor as one structure exceeding 10,000 square feet of non-residential gross building area and (ii) conclude that the Project will result in the enlargement

and alteration of Salem Harbor. Therefore, absent an exemption, USGenNE must obtain Site Plan Review approval from the Planning Board for the Project.

Consistent with the terms of the ACO, the Company filed today an application for Site Plan Review approval with the Planning Board. It is the Company's strong preference to satisfy the requirements of the Planning Board's review process, and obtain its approval in a timeframe and under terms that allow the Company to meet its obligations under the ACO. For that reason, USGenNE hereby moves to defer consideration of its request for an exemption from Section 7-18 of the Zoning Ordinance. Notwithstanding that motion, a description of why such an exemption could be needed is provided below.

b. Site Plan Review Approval Procedure. The process for obtaining Site Plan Review approval from the Planning Board can take up to 155 days after the submittal of the application for Site Plan Review approval. *See* Appendix 10 for the procedure for obtaining Site Plan Review approval. However, even if USGen NE were to obtain Site Plan Review approval, such approval is not a final action upon which USGenNE could rely with certainty. Under Massachusetts case law, a Site Plan Review approval that is not tied to a special permit approval is viewed as a prerequisite to the grant of a building permit and can only be challenged once a building permit is issued.³ An appeal of a building permit can produce substantial delay and uncertainty. While there is only a thirty-day time period between the time an applicant applies for a building permit and the time within which the local building inspector is required to grant or deny the permit, there are generous appeal periods thereafter if a building permit is granted. If the City of Salem Inspector of Buildings (the "Building Inspector") grants a building permit to

³ *Harrington v. Planning Board of Salem*, 763 N.E.2d 1140 (Mass. App. Ct. 2002); *Dufault v. Millenium Power Partners, L.P.*, 727 N.E.2d 87 (Mass. App. Ct. 2000); *St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority*, 705 N.E.2d 87 (Mass. App. Ct. 1999); *Quincy v. Planning Board of Tewksbury*, 652 N.E.2d 901 (Mass. App. Ct. 1995); and *McDonald's Corp. v. Town of Seekonk*, 424 N.E.2d 1136 (Mass. App. Ct. 1981).

USGenNE for the Project, a party claiming to be aggrieved by that grant has two grounds of appeal: violation of the Zoning Ordinance and/or violation of Title 780 of the Code of Massachusetts Regulations (the “Building Code”). *See* Appendix 11 for the procedure for obtaining and appealing a building permit on Zoning grounds and Appendix 12 for the procedure for obtaining and appealing a building permit on Building Code grounds.

An appeal on the grounds of a violation of the Zoning Ordinance can be taken up to six years after the grant of the building permit. Once a party makes such a request, it can take up to 158 days for the Board of Appeals to render a decision on that party’s appeal. If, after the Board of Appeals’ decision, the party further appeals to the Land Court, Superior Court, Housing Court or District Court within twenty days of the Board of Appeals’ decision, the time within which the matter can be resolved depends on the progress of the case in the trial, and, perhaps, the appellate courts.⁴

A party appealing the grant of a Site Plan Review approval for the Project would likely challenge the building permit issued, therefore, on the grounds that the grant was in violation of the Zoning Ordinance. For example, that party might argue that the Planning Board improperly granted USGenNE Site Plan Review approval. While that party must wait until a building permit is issued to appeal the Project’s Site Plan Review approval, that party also has a full six years to appeal the grant of that building permit. Given the critical nature of the Project, USGenNE cannot be exposed to the potential delays and uncertainties caused by this lengthy timeline. Therefore, under certain circumstances, it may move for the Department to consider its

⁴ If a party’s ground for appeal is the Building Code, that party has forty-five days after the grant of the building permit to appeal that grant to the State Building Code Appeals Board (“SBCAB”). Once a party appeals to the SBCAB, it can take up to 136 days for the SBCAB to render a decision on that party’s appeal. The SBCAB’s decision is not a final decision, however, as an aggrieved party may further appeal the SBCAB’s decision to the Superior Court. If such a further appeal is taken, the time within which the matter can be resolved depends on the progress of the case in the Superior Court, and, perhaps, the appellate courts.

request for an exemption from the requirements of the Site Plan Review provisions of the Zoning Ordinance. However, USGenNE asks that the Department defer consideration of its request for such an exemption at this time.

C. CONSEQUENCES OF PROJECT DELAY

Under the terms of the ACO, each of the four Salem Harbor units can continue to operate for a certain duration without the installation of the Project so long as each is deemed needed by ISO New England Inc. (“ISO”). However, continued operation of the units in the absence of the installation of the ECP equipment would cause the Company to comply with the 7.29 Regulations using an emissions Compliance Account rather than achieving contemporaneous emission reductions. Appendix 1, Section IV.B.3.a. The Company has filed for this exemption consistent with its obligations under the ACO to seek to permit the Project as expeditiously as possible. Section VII below provides additional details on the ACO.

VII. NEED FOR THE PROJECT

The Project is needed to implement certain terms of the ACO entered into by USGenNE to achieve long term compliance with the 7.29 Regulations for all units at Salem Harbor.

A. BACKGROUND OF ADMINISTRATIVE CONSENT ORDER

In June 2003, USGenNE reached a settlement with DEP, the City of Salem, the Conservation Law Foundation, representing a 55-member citizens group, HealthLink, the Wenham Lake Watershed Association, Clean Water Action and MASSPIRG regarding the steps USGenNE would take to comply with the 7.29 Regulations and the timeframes for taking those steps. The terms of that settlement are embodied in the ACO, dated June 19, 2003, included as Appendix 1.

Under the terms of the ACO, USGenNE committed to implement near term and long-term compliance measures. The Near Term Compliance Measures are described in Section IV.A of the ACO.

USGenNE has also agreed to undertake Long Term Compliance Measures for each “Reliability Unit” at Salem Harbor (ACO, Section IV.B). A “Reliability Unit” is defined as “[a]ny unit at Salem Harbor that is not a Non-Reliability Unit” (ACO, Section III.R). A “Non-Reliability Unit” is “[any unit at Salem Harbor that has received an approval to cease operations under the procedures of Section 18.4 of the Restated NEPOOL Agreement” (“RNA”) (ACO, Section III.M). Therefore, the Long Term Compliance Measures apply to those units at Salem Harbor that are needed for reliability purposes --those that have been denied approval by the ISO to cease operations.

B. 18.4 APPLICATIONS FOR SALEM HARBOR UNITS 1-4

On April 25, 2003, USGenNE filed an Application under Section 18.4 of the RNA for the retirement of all four of the Salem Harbor units not later than October 1, 2004.⁵ By letter dated July 22, 2003, the ISO responded to USGenNE as follows:

ISO New England has reviewed the above Applications and provided an assessment report, presented to the NEPOOL Reliability Committee on July 15, 2003, describing the impacts of a potential halt in operation of Salem Harbor. The report concluded that all of the Salem Harbor units are required for NEPOOL System reliability until vital transmission improvements in the North Shore and Boston Import areas are completed.

The above [18.4 Applications are] hereby not approved for implementation.

Letter of Mr. Stephen G. Whitley, ISO New England, to Mr. Philip C. Smith, PG&E National Energy Group, July 22, 2003, at 1 (included as Appendix 13). By virtue of the ISO having

⁵ At the request of the ISO, USGenNE reformatted its initial, single 18.4 Application for all four of the Salem Harbor Units, and submitted a separate Application for each of the four units (PGE-03-RR01, PGE-03-RR02, PGE-03-RR03 and PGE-03-RR04) on May 16, 2003. The effective date of the filing remained April 25, 2003.

denied USGenNE's 18.4 Applications to retire the four units at Salem Harbor, each of the four units is deemed a "Reliability Unit" under the terms of the ACO. Consequently, USGenNE is committed under the terms of the ACO to implement the Long Term Compliance Measures with respect to each unit provided sufficient financing from a public source is available to implement those measures.⁶

C. LONG TERM COMPLIANCE MEASURES

For each Reliability Unit at Salem Harbor, USGenNE has committed to achieving compliance under the ACO with the Phase I NO_x and SO₂ provisions of the 7.29 Regulations on or before July 31, 2006 so long as the "Compliance Equipment Funding Date" is achieved on or before December 1, 2003.⁷ In order to have all "Compliance Equipment"⁸ for the Project installed by that date, USGenNE also must be able to implement the permitting milestone schedule in Exhibit B of the ACO. That schedule was reviewed and accepted by all of the parties to the ACO. In order to begin construction in May 2004, which is necessary for the Project to be completed by July 31, 2006, all zoning approvals must be obtained not later than

⁶ Again, the exact timing of construction is subject to receipt of all required governmental authorizations, the arrangement of financing for such construction and, potentially, the approval of the U.S. Bankruptcy Court for the District of Maryland (Greenbelt Division), in which the bankruptcy proceeding of USGenNE is now pending.

⁷The Compliance Equipment Funding Date is defined as "[t]he date on which sufficient Compliance Equipment Funding is placed in escrow or otherwise made available such that a binding agreement with a qualified engineering, construction and procurement company or companies may be executed and a notice to proceed under such agreement may be issued." Appendix 1, Section III.G.

⁸ Compliance Equipment is defined as "[t]he equipment proposed to be installed on one or more Reliability Units by the selected vendor, consistent with Exhibit D of this ACO, to achieve compliance with the NO_x, SO₂ and mercury requirements of the 7.29 Regulations on Units 1, 2, and 3 including but not limited to Selective Catalytic Reactors, Dry Flue Gas Desulfurization Devices, Fabric Filters, and associated corollary equipment and structures; the equipment proposed to be installed on Unit 4, consistent with Exhibit D of this ACO, to achieve compliance, including but not limited to a Selective Non-Catalytic Reduction System; a windscreen for the coal pile; carbon injection equipment; a process to recycle fly ash; and activities necessary to allow the installation of such equipment such as tank removals and on-site demolition, excavation, filling, grading and other site preparation activities; and any other mitigation or other requirements imposed on USGenNE in connection with the construction and installation of the Compliance Equipment excluding the near term compliance measures in IV.A. below except to the extent such measures expressly are conditioned in Section IV.A., below, on the availability of Compliance Equipment Funding." Appendix 1, Section III.E.

January 31, 2004. To maximize the probability of obtaining all necessary zoning approvals by that date, USGenNE committed to submitting not later than September 1, 2003 (i) an application to the Salem Planning Board for Site Plan Review, and (ii) this petition for exemption from local zoning requirements pursuant to G.L. c. 40A, § 3. Appendix 1, Section IV.B.(i) and (ii).

VIII. IMPACTS OF THE PROJECT

The environmental, land use and other impacts of the construction and operation of the Project are described in detail in the *310 CMR 7.29 Emissions Control Project Environmental Impact Statement* prepared by TRC Environmental Corporation included here as Appendix 2.

IX. ALTERNATIVES CONSIDERED

A. ALTERNATIVE PROJECT APPROACHES

In response to the 7.29 Regulations, USGenNE worked closely with TRC Environmental Corporation and its consulting engineers, Sargent & Lundy LLC, to design an approach that would achieve the required emission reductions. One alternative, which initially showed great promise, was submitted to DEP in December 2001 as the Company's initial ECP Application. It included separate SCRs for Units 1, 2 and 3 located adjacent to the boilers and upstream of the ESPs, separate FGD/FF systems for Units 1 and 3 and no new control equipment for Unit 4. On further review, however, the Company determined that that approach was not feasible. In June 2002, the Company submitted an alternative plan to DEP which is the technical basis for the Compliance Equipment approved under the ACO.

B. ALTERNATIVE EQUIPMENT PLACEMENT

The purpose of the Project is to control air emissions at an existing generating facility. As such, the Project is limited to positioning immediately proximate to the existing generating units. Moreover, the relatively small size of the site and proximity to some of its neighbors

further limit the Project's siting options. Within those constraints, several placement alternatives were considered:

? North of Unit 4: this option was rejected due to the need for extremely long duct work runs for connection of ducts from the boilers and for the flue gas outlet connection to the existing stack located on the south side of Unit 1. Such long duct runs require substantially more duct work, larger foundations, and bigger fans to operate appropriately. In addition to higher capital costs, this option imposes higher efficiency penalties by having to operate the bigger fans.

? West of Units 1, 2 and 3: this option was rejected because that area is currently occupied by the existing switchyard.

? East of Units 1, 2 and 3: this option was rejected because the area is occupied by the turbine building for those units and by other structures up to the property line.

? South of the stack for Units 1, 2 and 3: although this option will require the removal of several tanks and relocation of some auxiliary equipment, it was deemed feasible because of the reasonable length of ductwork involved and because the existing switchyard operations would experience minimal disruption.

X. CONCLUSION

WHEREFORE, USGenNE prays that, pursuant to G.L. c. 40A, § 3, the Department:

(i) Find that USGenNE is a public service corporation with respect to its ownership and operation of Salem Harbor;

(ii) Find that a comprehensive exemption from the provisions of the Zoning Ordinance of the City of Salem is required;

(iii) Find that the Project is reasonably necessary for the convenience or welfare of the public;

(iv) Issue an Order that the use of the site and structures required for USGenNE to bring Salem Harbor into compliance with the 7.29 Regulations are exempt from the operation of the provisions of the Zoning Ordinance of the City of Salem with the exception of Section 7-18 of the Zoning Ordinance, the Site Plan Review provision; and

(v) Grant Petitioner's Motion to Defer Consideration of Its Request for Exemption from the Site Plan Review.

Respectfully submitted,

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By its attorneys,

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Dated: August 28, 2003

APPENDICES

- Appendix 1 Administrative Consent Order
- Appendix 2 *310 CMR 7.29 Emissions Control Project Environmental Impact Statement*
- Appendix 3 Zoning Ordinance of the City of Salem, Massachusetts
- Appendix 4 Contents of Applications for Special Permits
- Appendix 5 Procedure for Obtaining and Appealing Special Permits
- Appendix 6 Contents of Applications for Variances
- Appendix 8 Contents of Applications for Site Plan Review Approval
- Appendix 9 Standards for Applications for Site Plan Review Approval
- Appendix 10 Procedure for Obtaining Site Plan Approval
- Appendix 11 Procedure for Obtaining and Appealing a Building Permit on Zoning Grounds
- Appendix 12 Procedure for Obtaining and Appealing a Building Permit on Building Code Grounds
- Appendix 13 ISO 18.4 Determination for Salem Harbor 1-4
- Appendix 14 Final Report: Reliability Assessment of Proposed Retirement of Mystic 4-6, New Boston 1, and Salem Harbor 1-4 prepared by ISO New England Inc. dated July 9, 2003
- Appendix 15 Documentation That the Proposed Use Does Not Require the Filing of an ENF
- Appendix 16 Legal Description of Site
- Appendix 17 City of Salem Zoning Map
- Appendix 18 U.S. Geological Survey Land Use Map of Salem
- Appendix 19 Site Plan Submittal Drawings